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NO. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Supreme Court, U.S.
FILED
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Alexander L. Stevas, Clerk

ORIGINAL

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTION PRESENTED

Whether the Supreme Court of Florida denied petitioner the right to due process under the Fourteenth Amendment by arbitrarily disregarding, in its review of petitioner's conviction and sentence, three established state law protections routinely afforded to all defendants who seek appellate review of capital cases in Florida?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

OPINIONS BELOW

The order of the Florida Supreme Court summarily denying Jeffery Joseph Daugherty's petition for a writ of habeas corpus is reproduced in the Appendix at A-1.* The opinion of the Florida Supreme Court affirming Mr. Daugherty's sentence of death is reported at 419 So.2d 1067 (Fla. 1982). This Court's denial of Mr. Daugherty's petition

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* Page references to the Appendix to this Petition are cited as "A- ."

for a writ of certiorari to the Supreme Court of Florida to review the decision on direct appeal is reported at 103 S.Ct. 1236 (1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3). The judgment of the Florida Supreme Court was set forth in its order entered on November 15, 1983. A-1. This petition for certiorari was filed within 90 days of that date pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Florida Statutes Annotated Section 921.141. Those provisions are set forth in the Appendix at A-2.

PRELIMINARY STATEMENT

The Florida Supreme Court's summary denial* of the petition for a writ of habeas corpus below raises an important

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* Florida Rule of Appellate Procedure 9.100(f) provides in pertinent part:

> If the petition [for habeas corpus] demonstrates a preliminary basis for relief [or] a departure from the essential requirements of law, . . . the court may issue an order directing the respondent

[Footnote continues]

question of federal constitutional law concerning the extent to which the denial of state-created procedural rights to specific capital sentencing protections implicates the Due Process Clause of the Fourteenth Amendment.

In the wake of Furman v. Georgia, 408 U.S. 238 (1972), and its Florida counterpart, Donaldson v. Sack, 265 So.2d 499 (1972), the State of Florida adopted a new capital punishment scheme that provided for automatic appellate review by the Florida Supreme Court. That statute, however, did not prescribe the specific form of appellate review that the Florida Supreme Court was to undertake. In order to define a meaningful role in the Florida scheme -- and thereby to minimize the possibility of arbitrary and capricious executions under Florida law -- the Supreme Court of Florida in turn adopted certain procedures for the review of all capital cases in Florida.

In this case, the Florida Supreme Court disregarded these procedures in three important respects. First, the Florida Supreme Court failed to conduct any proportionality review of petitioner's death sentence, either on direct appeal or during the habeas corpus proceeding which specifically sought such review. Second, the Florida Supreme Court failed to conduct an independent reweighing of the statutory circumstances to determine whether the death sentence is genuinely

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[Footnote continued]

> to show cause, within the time set by the court, why relief should not be granted.

The Florida Supreme Court issued no such order in this case, and thus denied the petition without requiring a a response from the State.

supportable in this case. Third, the Florida Supreme Court failed to have before it and review the entire record on which the lower court based its decision to sentence Mr. Daugherty to death. It thus arbitrarily denied petitioner the procedural safeguards afforded other capital defendants in Florida.

Petitioner does not contend herein that the denial of any one of the above-delineated protections alone necessarily constitutes an Eighth Amendment violation.* In fact, this Court has recently declared that an appellate proportionality review in all death penalty cases is not mandated by the Eighth Amendment. Pulley v. Harris, 52 U.S.L.W. 4141 (U.S. January 24, 1984) (No. 82-1095). Florida, however, has chosen to provide capital defendants a right to proportionality review, as well as other protections not specifically mandated by the Eighth Amendment.

Thus, the instant case is entirely distinguishable from Pulley. The question presented here is not whether an individual can constitutionally be put to death under a state statutory scheme which does not provide for proportionality review. Rather, the question is whether a state that chooses to provide specific and substantial protections in the death penalty process can constitutionally execute a particular defendant who has been arbitrarily denied the protections afforded all other capital defendants in that state.

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* However, petitioner does not concede that the Florida capital punishment scheme would survive Eighth Amendment challenge in the absence of the three, state-created protections arbitrarily denied petitioner in this case. That issue was presented below in petitioner's habeas corpus petition, and rejected.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

On November 18, 1980, Jeffery Joseph Daugherty pleaded guilty to five separate counts in connection with the death of Patricia Lavonne Sailer: first degree premeditated murder, first degree felony murder (robbery), first degree felony murder (kidnapping), robbery and kidnapping. On the same day, the lower court commenced an evidentiary hearing pursuant to Florida Statutes Annotated Section 921.141(1) to determine whether petitioner should be sentenced to death or life imprisonment.

On November 20, 1980, a majority of the advisory jury recommended the death penalty on each of the three counts of murder. On April 27, 1981, the court imposed the death penalty for first degree murder. In its Order of Judgment and Sentence, R-311,* the court expressly stated that it had considered the presentence investigation report, the evidence from the hearing and the arguments of counsel in finding two aggravating circumstances. The court further stated that it had "weigh[ed] the aggravating and mitigating circumstances" in reaching its conclusion that "there are sufficient aggravating circumstances . . . and insufficient mitigating circumstances" to justify the death penalty in this case. R-314.

B. Proceedings in the Florida Supreme Court on Direct Appeal

On May 28, 1981, petitioner directly appealed his death sentence to the Florida Supreme Court pursuant to the

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* The rcord on appeal to the Florida Supreme Court is designated by an "R- ."

automatic review provision of Florida Statutes Annotated Section 921.141(4). The lower court, however, did not transmit the entire record of the sentencing proceeding to the Florida Supreme Court. Nevertheless, on September 14, 1982, the Florida Supreme Court affirmed petitioner's death sentence, Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982), on the basis of a record that did not include (1) the trial court's sentencing instructions to the jury, (2) the arguments of counsel, (3) the jury voir dire and (4) petitioner's taped confession which was played at the evidentiary hearing.

On September 23, 1982, petitioner filed a timely motion for additional time in which to move for rehearing.* Petitioner raised, among other issues, the fact that the Florida Supreme Court did not have the entire record of the sentencing proceeding before it on direct appeal and that one or more of the convictions upon which the lower court found an aggravating circumstance had been reversed. Petitioner also raised the possibility of errors in the charge to the sentencing jury, which was not part of the record on direct appeal. The Florida Supreme Court denied the motion for additional time on September 30, 1982, by which date petitioner's initial time to move for rehearing had elapsed.

C. Proceedings in the U.S. Supreme Court Following the Florida Supreme Court's Decision on Direct Appeal

The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court and Circuit Justice for the

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* Petitioner's appointed counsel below withdrew from this case prior to the issuance of the Florida Supreme Court's judgment. Present counsel, having first appeared in connection with the motion for additional time, was formally retained on September 30, 1982.

Eleventh Circuit, granted an extension of time to file a petition for a writ of certiorari. On December 13, 1982, petitioner filed a petition for a writ of certiorari. This Court denied that petition on February 22, 1983, with Justices Brennan and Marshall dissenting. Daugherty, 103 S.Ct. 1236 (1983).

D. Habeas Corpus Proceedings in the Florida Supreme Court

On November 8, 1983, petitioner filed a petition for a writ of habeas corpus with the Florida Supreme Court pursuant to its original jurisdiction. Petitioner raised and fully briefed the issues presented herein concerning the Florida Supreme Court's failure to conduct any proportionality review, failure to conduct an independent reweighing of the statutory circumstances and failure to review the entire record on which the lower court sentenced petitioner to death. The petition was summarily denied by the Florida Supreme Court on November 15, 1983.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT DENIED PETITIONER THE RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY DISREGARDING ESTABLISHED STATE LAW PROTECTIONS FOR APPELLATE REVIEW OF CAPITAL CASES IN FLORIDA.

In response to Furman, the legislature of the State of Florida provided a number of specific safegaurds in the prosecution of all capital cases, including an automatic review by the Florida Supreme Court of both the underlying convictions and the resulting capital sentence. Fla. Stat.

Ann. § 921.141. In its first decision under the new death penalty statute, the Florida Supreme Court articulated specific procedures by which it would conduct its mandatory appellate review. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied sub nom., Hunter v. Florida, 416 U.S. 943 (1974). By the time this Court considered the constitutionality of Florida's new death penalty statute, these appellate procedures were so established in the decisions of the Florida Supreme Court that this Court recognized them as an integral part of the Florida death penalty scheme. Proffitt v. Florida, 428 U.S. 242, 251-53 (1976). See Pulley, 52 U.S.L.W. at 4143-4144 n.8 (proportionality review). Thus, when petitioner decided to plead guilty, he could reasonably expect that he would not be sentenced to death without full recourse to the procedural safeguards well-established by the Florida Supreme Court even before Proffitt.

In this case, Mr. Daugherty's reasonable expectations were not fulfilled. Rather, the Florida Supreme Court affirmed his sentence of death without engaging in at least three of the procedures it had adopted for review of all death penalty cases: (1) the Florida Supreme Court did not conduct a proportionality review to ensure that the disposition of this case was consistent with the dispositions of other capital cases; (2) it did not reweigh the evidence of aggravating and mitigating circumstances and make an independent determination that the evidence supports the imposition of the death penalty; and (3) it did not review the entire record on which the lower court based its decision to sentence petitioner to death. Under these circumstances, the Florida

Supreme Court denied petitioner state-created procedural rights, and in so doing, transgressed the Due Process Clause of the Fourteenth Amendment.

A. The Supreme Court of Florida Denied Petitioner State-Created Rights to Certain Specific Procedures for Appellate Review of All Capital Cases.

1. Proportionality Review

This Court in Proffitt expressly observed that, under the Florida death penalty scheme, "[the] decisions [of the lower court] are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances." Proffitt, 428 U.S. at 253. This Court then concluded that, "[b]y following this procedure[,] the Florida [Supreme] [C]ourt has in effect adopted [a] type of proportionality review . . . ." Proffitt, 428 U.S. at 259. See also Pulley, 52 U.S.L.W. at 4143-44 n.8.

This conclusion is solidly grounded in numerous decisions of the Florida Supreme Court both prior to, and since, Proffitt. In Menendez v. State, 419 So.2d 312 (Fla. 1982), the Florida Supreme Court stated that its "function in reviewing a death sentence is to consider the circumstances in light of . . . other decisions and determine whether the death penalty is appropriate." Id. at 315 (citing State v. Dixon, 283 So.2d 1). In Jacobs v. State, 396 So.2d 1113 (Fla.), cert. denied, 454 U.S. 933 (1981), the Florida Supreme Court acknowledged its "responsibility to review the judgment and sentence imposed upon defendant in light of other decisions and determine whether the punishment is too great." Id. at 1117. See also Raulerson v. State, 358 So.2d 826,

834 (Fla.), cert. denied, 439 U.S. 959 (1978); State v. Dixon, 283 So.2d at 10.

In Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981), the Florida Supreme Court stated that one aspect of its review process was "to ensure relative proportionality among death sentences which have been approved statewide." Id. at 1331. It described this aspect as a "compar[ison of] the case under review with all past capital cases to determine whether or not the punishment is too great." Id. at 1331 (citing Proffitt, 428 U.S. 242 and State v. Dixon, 283 So.2d 1) (emphasis added). And in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), the Florida Supreme Court declared: "It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great." Id. at 540 (citing State v. Dixon, 283 So.2d 1).

In Goode v. State, 365 So.2d 381 (Fla. 1978), cert. denied, 441 U.S. 967 (1979), the Florida Supreme Court more specifically "compar[ed] the aggravating and mitigating circumstances with those shown in other capital cases . . ." Id. at 384. And in McCray v. State, 416 So.2d 804 (Fla. 1982), the Florida Supreme Court held that, "[g]iven the circumstances of this case, . . . a life sentence was not unreasonable and, in fact, is consistent with [the dispositions of other cases under] similar circumstances." Id. at 808 (citing illustrative cases).

At the heart of the somewhat abstract notion of "proportionality" is the basic concept of equality under the

law. The Florida Supreme Court has acknowledged that it is "extremely sensitive to the demands of equality before the law in cases in which [it] must consider whether a sentence of death should be upheld." Meeks v. State, 339 So.2d 186, 192 (Fla. 1976), cert. denied, 439 U.S. 991 (1978). As the court declared in Slater v. State, 316 So.2d 539 (Fla. 1975): "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." Id. at 542 (holding that "[t]he imposition of the death sentence in [the case before it] is clearly not equal justice under the law."). See also Jackson v. State, 366 So.2d 752, 757 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

Thus the proportionality review evolved in the decisions of the Florida Supreme Court. In State v. Dixon, 283 So.2d 1, the court proclaimed: "Review by this [c]ourt guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Id. at 10 (emphasis added). That guarantee has not been hollow. As the Florida Supreme Court said in Brown, 392 So.2d 1327, "[i]n those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment." Id. at 1331 (citing Malloy v. State, 382 So.2d 1190 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976)) (emphasis added). Thus, the proportionality review has made the difference between life and death for some inmates of the Florida penal system who in fact received such review.

As the opinion on direct appeal fails to articulate any proportionality considerations, and is devoid of any citations to comparable death penalty cases, it cannot reasonably be presumed that proportionality review was in fact conducted in this case.* It is no answer simply to surmise that the Florida Supreme Court conducted such a review sub silentio. Due process cannot countenance such blithe assumptions. Having chosen to confer a right to a specific appellate procedure to which federal due process rights attach, Florida cannot through silence preclude federal review by refusing to articulate the fact and manner of its performance of that procedure.

2. Independent Determination

The Florida Supreme Court also has assumed the responsibility of making an independent determination as to whether the evidence is sufficient to warrant the imposition of the death penalty. In Goode v. State, 365 So.2d 381, the Florida Supreme Court stated: " . . . [after] weighing the evidence in the case . . ., our judgment is that death is the proper sentence." Id. at 385. In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court recognized that "[it] must . . . determine independently whether under all the circumstances the death penalty was appropriate punishment. . . ." Id. at 1000 (emphasis added).

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* Notwithstanding this Court's recent dictum in Pulley, 52 U.S.L.W. at 4144 n.8, petitioner does not understand this Court to have ever squarely addressed the constitutionality of Florida's purported right to conduct an integral aspect of its appellate review in silence. Certainly the issue was neither presented nor briefed in Pulley where the California Supreme Court expressly disclaimed an obligation to conduct any proportionality review under that state's capital punishment statute.

In Jacobs v. State, 396 So.2d 1113, the Florida Supreme Court stated: "We have carefully reviewed the record . . . and it is our opinion that the [statutory] circumstances are such that the infliction of capital punishment is warranted." Id. at 1120. In Neary v. State, 384 So.2d 881 (Fla. 1980), the Florida Supreme Court announced: "It is our duty to examine the record in this cause and determine whether there are clear and convincing facts that warrant the imposition of the death penalty over . . . life imprisonment." Id. at 885. Neary demonstrates that this independent review is by no means perfunctory. In that case, the Florida Supreme Court reversed the death sentence after reevaluating the weight to be afforded the following mitigating circumstances: (1) the defendant was young (18 years old); (2) the case against the co-defendant had been dismissed on a motion for a directed verdict; (3) the defendant was a slow learner; and (4) the defendant grew up without a father.* Id. at 885-87.

In two other cases, the Florida Supreme Court was quite explicit about its function in reviewing death sentences. In Raulerson v. State, 358 So.2d 826, the Florida Supreme Court announced that, "[i]n reviewing the [statutory] circumstances, the nature of the murder and the circumstances under which it was committed, we hold that the aggravating

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* The instant case involves strikingly similar mitigating circumstances to Neary: (1) petitioner was completely abandoned by his mother at the age of two and seldom lived in the same household with his father; (2) he was beaten and abused at an early age; (3) he moved frequently as a child, changing schools numerous times before dropping out of school during the tenth grade; (4) he was 20 years old at the time of the offense; and (5) neither of his two substantially older co-participants was formally charged for the crime for which Mr. Daugherty now stands sentenced to die.

circumstances outweigh the mitigating circumstances and the penalty of death is the proper sentence." Id. at 835. See also Jackson v. State, 366 So.2d at 758. ("We find that the aggravating factors outweigh those in mitigation . . . ."). And in Halliwell v. State, 323 So.2d 557 (Fla. 1975), the Florida Supreme Court followed the same procedure, but overturned the death sentence, stating: ". . . we have weighed both the aggravating and the mitigating circumstances as shown in the record, and we conclude that the death penalty is not warranted." Id. at 561.

In upholding the constitutionality of the Florida death penalty statue, this Court examined the reviewing process adopted by the Florida Supreme Court in numerous state cases, and accepted that, in practice, that court fulfilled the meaningful supervisory role it purported to serve. The very essence of the Florida appellate review system was the assurance that "the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Proffitt, 428 U.S. at 253 (quoting Songer v. State, 322 So.2d 481, 484 (Fla. 1975)).

That the independent reweighing process assumed by the Florida Supreme Court lies at the very core of the Florida death penalty scheme was recently underscored by this Court in Goode v. Wainwright, 52 U.S.L.W. 3419 (U.S. November 28, 1983) (No. 83-131). In Goode, the Court of Appeals reversed a denial of a petition for a writ of habeas corpus on the ground that the trial judge improperly considered a non-statutory aggravating circumstance -- future dangerousness --

in sentencing petitioner to death. In reversing the Court of Appeals, this Court concluded:

> Even if the Court of Appeals had been correct in concluding that the sentencing judge had relied on a factor unavailable to him under state law, it erred in reversing the district court's dismissal of Goode's habeas petition. . . . Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [the petitioner's] future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id. at 3421 (emphasis added).

As is evident by this Court's disposition of Goode, the Florida Supreme Court's de novo weighing of the aggravating and mitigating circumstances can provide a rational basis for imposition of the death penalty, even where the sentencing court itself may well have been influenced by an element of capriciousness. The necessary corollary of attributing such significance to the independent reweighing process is that, without such an independent and thorough review, there is no sound basis for concluding that the State has fulfilled its responsibility to minimize to the greatest extent feasible the possibility of an arbitrary and capricious sentencing determination. See Proffitt, 428 U.S. at 253.

In the instant case, the Florida Supreme Court clearly shirked its responsibility to perform an independent reweighing of the aggravating and mitigating circumstances. Rather than making such an independent determination of the propriety of sentencing petitioner to death, the Florida Supreme Court simply assessed whether the lower court's findings on the issues raised by appellate counsel were

"supported by the record." Daugherty v. State, 419 So.2d at 1071. Rather than reviewing or reweighing the evidence of aggravating and mitigating circumstances, it expressly deferred to "the province of the trial court to decide whether a particular [statutory] circumstance has been proven and the weight to be given it." Id. Thus, it is evident that, by purporting to do no more than check for error and, finding none, affirming petitioner's death sentence, the Florida Supreme Court failed to afford petitioner the kind of appellate review which it has routinely afforded other capital defendants.

3. Entire Record

The Florida death penalty statute, in response to Furman, expressly provides that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record . . . ." Fla. Stat. Ann. § 921.141(4) (West Supp. 1983) (emphasis added). In interpreting this statute, the Florida Supreme Court unequivocally stated: "We construe that terminology to require a full record review for trial error and a determination of the sufficiency of the evidence, as well as the appropriateness of the imposition of the death sentence." Combs v. State, 403 So.2d 418, 422 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) (emphasis added). Thus, the Florida Supreme Court has found a statutory right in all death penalty cases to a tripartite review of the entire record that consists of: (1) a review for trial error; (2) a review of the sufficiency of the evidence; and (3) a review of the appropriateness of the death sentence.

The Florida Supreme Court repeatedly has enforced this right. In Williams v. State, 386 So.2d 538 (Fla. 1980), the Florida Supreme Court stated: "As is our duty in death penalty cases, we have thoroughly examined the entire record in this case . . . ." Id. at 541 (emphasis added). Similarly, the Florida Supreme Court declared in Delap v. State, 350 So.2d 462 (Fla. 1977): "Our review is of the entire record of the conviction and the sentence of death." Id. at 463 n.1 (emphasis added). It immediately followed that pronouncement with a citation to the Florida death penalty statute, Fla. Stat. Ann. § 921.141. Id.

In Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, 103 S.Ct. 317 (1982), the Florida Supreme Court affirmed a death sentence after "[h]aving reviewed the entire record." Id. at 1175 (emphasis added). And in Jackson v. State, 366 So.2d 752, the Florida Supreme Court announced that, "[a]fter careful review of the entire record, we affirm . . . the sentence." Id. at 753 (emphasis added).

In sentencing Mr. Daugherty to death, the lower court stated that it had "carefully consider[ed] and weigh[ed] the evidence presented during [the] plea and sentencing proceedings, the arguments of the attorneys as to the sentence to be imposed and the information contained in the Pre-sentence Investigation Report prepared by the Department of Corrections . . . ." R-311. However, in transmitting the record to the Florida Supreme Court for review on direct appeal, the lower court omitted (1) its sentencing instructions to the jury, (2) the arguments of counsel, (3) the jury voir dire and (4) petitioner's taped confession which

was played at the evidentiary hearing. As a result, the Florida Supreme Court did not even have -- let alone review -- the entire record on which the lower court relied in sentencing petitioner to death.

B. The State-Created Rights to Certain Procedures for Appellate Review of Capital Cases Invoke the Protections of the Due Process Clause of the Fourteenth Amendment.

As is evident from the preceding discussion, the Florida Supreme Court has adopted and utilized certain specific procedures for the review of capital cases. These established procedures, relied upon by this Court in upholding the Florida death statute, give rise to the legitimate interest in having the Florida Supreme Court follow them in every death penalty case. See Gardner v. Florida, 430 U.S. 349, 358 (1977). The failure to do so is not simply a matter of state law, but a denial of fundamental due process under the Fourteenth Amendment.

This Court has repeatedly held that "state statutes may create . . . interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones, 445 U.S. 480, 488 (1980). See also Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Aldana v. Holub, 381 So.2d 231, 236 n.9 (Fla. 1980); Von Stephens v. School Board of Sarasota County, 338 So.2d 890, 894 (Fla. Dist. Ct. App. 1976). This means that, even where there is no constitutional right to certain procedures, a state may

create a "right or justifiable expectation" that those procedures are requisite to some adverse action. Vitek, 445 U.S. at 489; Montanye v. Haymes, 427 U.S. 236 (1976). See also Woodson v. North Carolina, 428 U.S. 280, 319 (1976) (Rehnquist, J., dissenting) ("If the states wish to undertake such an effort [e.g., proportionality review], they are undoubtedly free to do so, [even though] it is not required by the United States Constitution"), quoted in Pulley, 52 U.S.L.W. at 4144 n.11.

"Once a state has [created such a right], . . . due process protections are necessary 'to ensure that the state-created right is not arbitrarily abrogated.'" Vitek, 445 U.S. at 488-89 (quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1974)). See also Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Greenholtz, 442 U.S. at 12. As the Florida Supreme Court itself recognized, "[v]ital to the concept of procedural due process is the notion that valuable . . . interests, such as those conferred by state law, must not be 'arbitrarily undermined.'" Aldana, 381 So.2d at 236 n.9 (quoting Roth). See also Ragucci v. City of Plantation, 407 So.2d 932, 935 (Fla. Dist. Ct. App. 1981); Johnson v. School Board of Palm Beach County, 403 So.2d 520, 524 & n.6 (Fla. Dist. Ct. App. 1981); Von Stephens, 338 So.2d at 894-95.

Both the legislature of the State of Florida and the Florida Supreme Court have created in petitioner a legitimate expectation that he would not be sentenced to death without full recourse to the established procedures of the Florida Supreme Court. At the heart of this expectation is Mr. Daugherty's interest in life imprisonment over death.

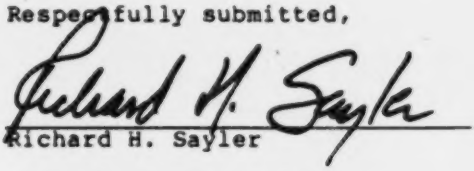
The "fundamental nature" of this interest places it well within the parameters of Fourteenth Amendment protection. See Roth, 408 U.S. at 570-71; Morrisey v. Brewer, 408 U.S. 471, 481 (1972). As this Court has observed: "'[a]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" Vitek, 445 U.S. at 492 (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)). As it is hard to imagine a greater intrusion on Mr. Daugherty's personal security than Florida's calculated imposition of the death penalty, the Florida Supreme Court's failure in this case to follow its established standards and procedures for appellate review of all capital cases in Florida violates his right to due process under the Fourteenth Amendment.

CONCLUSION

For the reasons stated herein, Mr. Daugherty hereby requests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court summarily denying his petition for a writ of habeas corpus.

Dated: February 13, 1984

Respectfully submitted,



Richard H. Sayler

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Petitioner Jeffery Joseph Daugherty

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Of Counsel:

Allan R. Freedman
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DONOVAN LEISURE NEWTON & IRVINE

Supreme Court of Florida

SUNDAY, NOVEMBER 13, 1983

JEFFREY JOSEPH DAUGHERTY,	**	
Petitioner,	**	CASE NO. 54,489
vs.	**	
LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,	**	
	**	
Respondent.	**	
	**	

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

A True Copy

Test:

Sid J. White
Clerk Supreme Court.

cc: Allan R. Freedman, Esquire
Richard M. Sayler, Esquire
and Daniel J. Thomasch, Esquire
Anthony P. Mario, Esquire
and Burton J. Green, Esquire
Hon. Jim Smith
Evelyn D. Golden, Esquire

Best Copy Available

should begin to run. *Casto* was decided after the district court's decision in *Grabarnick*.

We quash the decision of the district court dismissing the appeal as untimely and remand the cause for further consideration in accordance with the views expressed in *Casto* and this opinion.

It is so ordered.

BOYD, OVERTON and SUNDBERG, JJ., concur.

McDONALD, J., dissents with an opinion, with which ALDERMAN, C. J., concurs.

McDONALD, Justice, dissenting.

I dissent. We made a mistake in *Casto v. Casto*, 404 So.2d 1046 (Fla.1981), and this case gives us a vehicle to correct that error. The time for filing a petition for rehearing should commence to run when the judgment sought to be reheard is filed with the clerk of the court. The Third District Court of Appeal correctly dealt with this issue in *Dibble v. Dibble*, 377 So.2d 1001 (Fla.3d DCA 1979). We should adopt that opinion and dispose of this case accordingly.

ALDERMAN, C. J., concurs.

Jeffrey Joseph DAUGHERTY, Petitioner,

v.

STATE of Florida, Respondent.

No. 60709.

Supreme Court of Florida.

Sept. 14, 1982.

Defendant was convicted in the Circuit Court, Bravard County, J. William Woodson, Jr., of first-degree murder, and he appealed. The Supreme Court held that: (1) it was not error to permit State to introduce, in death penalty sentencing phase of capital murder prosecution, defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced; (2) evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity; and (3) record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

Affirmed.

1. Homicide ⇐354

It was not error to permit State to introduce in death penalty sentencing phase of capital murder prosecution defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced. West's F.S.A. § 921.141(5)(b).

2. Criminal Law ⇐986.2(4)

Evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity.

3. Homicide ⇐354

In sentencing phase of capital murder prosecution, record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's

participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

4. Homicide ⇐354

In sentencing phase of capital murder prosecution, it was not error to fail to find nonstatutory mitigating factors of defendant's claimed remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and defendant's ineligibility for parole for 107½ years.

5. Criminal Law ⇐1208(1)

It is within province of trial court to decide whether particular mitigating circumstance in sentencing has been proven and weight to be given it in determining whether to impose death penalty.

Arthur J. Kutsche, of the Law Offices of A. J. "Sonny" Kutsche, Titusville, for petitioner.

Jim Smith, Atty. Gen., and C. Michael Barnette, Asst. Atty. Gen., Daytona Beach, for respondent.

PER CURIAM.

Jeffrey Joseph Daugherty appeals his conviction and sentence of death for the first-degree murder of Lavonne Patricia Sailer. We affirm.

Daugherty, along with his girl friend Bonnie Heath and his uncle, left Michigan in January 1976 and traveled to Florida purportedly to look for jobs and to visit Heath's children. On February 23, 1976, he robbed an Easy Way food store and shot and killed Carmen Abrams and seriously wounded her husband. Continuing on a killing and robbing spree, on March 1, 1976, Daugherty and Heath picked up Lavonne Sailer who was hitchhiking in Melbourne, Florida. They took her to an isolated area near the Brevard County dump where Daugherty told her to get out of the car and robbed her. He then shot her five times at close range with a .22 caliber pistol. They then returned to the nearby bar to pick up Daugherty's uncle. Thereafter for a twenty-day period, Daugherty, along with Heath, continued on a course of robberies and murders, several of which he was convicted and for which he was sentenced prior to being convicted and sentenced for the Sailer murder.

Daugherty pled guilty to the first-degree murder, robbery, and kidnapping of Sailer. A jury was then impaneled for the sentencing phase. The jury recommended a sentence of death, and the judge imposed the death sentence for the first-degree murder and life sentences for the robbery and kidnapping. The trial court found as an aggravating factor that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. It enumerated the previous convictions as follows:

(1) The defendant was convicted and sentenced on July 31, 1980, for First Degree Murder in Flagler County, Fl. where he shot and killed a white female in her sixties by shooting her in her left shoulder and right temple during the course of robbing the victim.

(2) The defendant was sentenced on July 14, 1980, for the Murder of a white female by the name of Campbell whom he stabbed after he had robbed her place of business in Volusia County, Fl.

(3) The defendant was convicted and sentenced on September 29, 1978, for Criminal Homicide, Criminal Conspiracy, Robbery and crimes committed with firearms. The defendant robbed a gas station and in the process shot the young attendant twice in the side, once in the bridge of the nose and once under the chin.

(4) The defendant was convicted and sentenced on January 4, 1980, for Robbery, Aggravated Assault, Simple Assault and crimes committed with firearms. In Altoona, Pa. the defendant robbed a woman clerk at Rich's Music Store with a firearm and in the process assaulted the woman a number of times until she lost consciousness.

(5) The defendant was convicted and sentenced on September 29, 1978, in the State of Pennsylvania for the crimes of Simple Assault, Aggravated Assault, Burglary, Robbery and crimes committed with firearms.

(6) The defendant was convicted and sentenced on July 12, 1976, in the State of Virginia for Armed Robbery and using a firearm while committing a felony.

(7) The defendant was convicted and sentenced on January 4, 1980, for Criminal Conspiracy, Robbery and Criminal Homicide. The defendant robbed one Betty Shank at a Jack's Kwik-Mart in Blair County, Pa. and in the process killed the clerk by shooting her in the body and head.

The trial court also found as an aggravating circumstance that the murder was committed for pecuniary gain. Weighing the aggravating and mitigating circumstances, it concluded the death sentence is justified because there are sufficient aggravating circumstances and insufficient mitigating circumstances.

Daugherty does not challenge his plea of guilty to the charges against him. The transcript of the plea proceeding evidences the voluntariness of his plea. In response to the trial court's inquiry, Daugherty stated that he was neither coerced nor compelled to plead guilty nor promised any leniency, gain, advantage, probation, or any other benefit to persuade him to plead guilty; that he fully understood the charges against him to which he pled guilty and the possibility of the imposition of the death penalty; and that he was also fully advised of all the rights he waived by pleading guilty. When asked during oral argument by this Court whether there was any question as to the voluntariness of Daugherty's pleas, Daugherty's counsel answered in the negative.

[1] Daugherty does challenge his death sentence. He contends that the court erred in allowing the State to present evidence of prior convictions as an aggravating circumstance where the offenses occurred subsequent to the capital felony for which he is now being sentenced and that the trial court erred in considering these prior convictions as an aggravating circumstance. He concedes, however, that we have resolved this argument against him in several recent decisions.

The State responds that not only have our decisions foreclosed this argument, but also Daugherty does not have standing to raise this point since one of the murders for which Daugherty was convicted was committed prior to the murder of Lavonne Sailer.

In *Elledge v. State*, 346 So.2d 998 (Fla. 1977), we rejected this same argument and held that it is clear from a reading of section 921.141(5)(b), Florida Statutes (1975), that the legislature referred to "previous convictions" and not to "previous crimes." Prior conviction, we emphasized, is the important element of this aggravating circumstance. *See also Lucas v. State*, 376 So.2d 1149 (Fla.1979). We likewise held in *King v. State*, 390 So.2d 315, 320 (Fla. 1980), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), that "[t]he legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." *See also Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981).

We hold that the trial court did not err in permitting the State to introduce these prior convictions and did not err in finding the aggravating circumstance that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

Daugherty also argues that the court erred in not considering certain mitigating factors. He initially contends that the trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity. He asserts that the court erroneously premised its conclusion that this mitigating factor did not exist on the basis that Daugherty had been previ-

ously convicted of four murders. The court also noted that he had been convicted of three other robberies and two aggravated assaults. These crimes, states Daugherty, were committed after the Sailer murder. The State points out that one of these convictions was for a murder committed prior to the Sailer murder.

[2, 3] This prior conviction of the earlier committed capital felony is alone sufficient to negate the mitigating factor of no significant history of prior criminal activity. Moreover, in *Ruffin v. State*, we held that all of these prior convictions could be properly considered as a basis for rejecting this mitigating factor. In *Ruffin*, we said that "prior" means prior to sentencing of a defendant and does not mean prior to the commission of the murder for which he is being sentenced. We explained:

> The interpretation of "prior" advanced by Ruffin is unreasonable particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of these years he may have a long history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance.

397 So.2d at 283. Thus, we hold that the trial court properly rejected this mitigating factor. We further find no error in the court's rejecting the other statutory mitigating factors. Specifically as to other statutory mitigating factors, the trial court properly found:

> ....
>
> (b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> FINDING:
>
> The Court finds the defendant was not under the influence of extreme mental or emotional disturbance. The defendant, Daugherty, at his trial claimed he did suffer from headaches but at the time he killed the victim in this case he was not suffering from any headaches so the court did not consider this a mitigating circumstance.
>
> (c) Whether the victims were participants in the defendant's conduct or consented to the acts.
>
> FINDING:
>
> The victim did not participate in the conduct or consent to the acts.
>
> (d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.
>
> FINDING:
>
> The defendant was the main participant in the murder and was the one who actually fired the shots into the victim.
>
> (e) Whether the defendant acted under extreme duress or under the substantial domination of another person.
>
> FINDING:
>
> The defendant claimed that he was influenced by his traveling companion, Bonnie Heath. The Court determines that while Bonnie Heath was a participant in many of the crimes she was a small woman in comparison to the defendant and the defendant was not under the extreme duress or domination of Bonnie Heath.
>
> (f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.
>
> FINDING:
>
> The defendant had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

The evidence introduced at the sentencing hearing does not support a finding of any of these factors. Furthermore, the court did not err in rejecting the mitigating factor of age under the particular circumstances of

this case. At the time of this murder, Daugherty was 20 years old. As we said in *Peek v. State*, 395 So.2d 492, 498 (Fla.), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." We concluded in *Peek* that the trial court's rejection of age of 20 as a mitigating factor was supported by the record.

[4] Daugherty finally contends that the court erred in failing to find certain nonstatutory mitigating factors, *i.e.*, his alleged remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and the fact that at the time of sentencing, because of previous convictions, he would not be eligible for parole for 107½ years. Daugherty does not argue that the court failed to consider these circumstances or that it prevented him from introducing any relevant evidence of mitigation, nor would such an assertion be supported by the record. The court expressly stated that it considered and weighed all the testimony and evidence.

[5] We find no merit to this contention. The trial court considered all the evidence and decided that the death sentence was warranted since there were sufficient aggravating circumstances and insufficient mitigating circumstances. His conclusions are supported by the record. As we have previously stated, it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it. *Riley v. State*, 413 So.2d 1173 (Fla. 1982); *Smith v. State*, 407 So.2d 894 (Fla. 1981); *Lucas v. State*, 376 So.2d 1149 (Fla. 1979).

Accordingly, finding no error, we affirm.

It is so ordered.

ALDERMAN, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

DEPARTMENT OF TRANSPORTATION, State of Florida, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

HILLSBOROUGH COUNTY, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

CITY OF TAMPA, etc., Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

Nos. 61029, 61042 and 61053.

Supreme Court of Florida.

Sept. 14, 1982.

Action was brought against truck owner, Department of Transportation, Hillsborough County and City of Tampa to recover for personal injuries which plaintiffs sustained in intersectional motor vehicle collision. The Circuit Court, Hillsborough County, O. D. Howell, Jr., J., dismissed the governmental entities. The District Court of Appeal, 376 So.2d 296, reversed and remanded. On remand, the trial court again dismissed the governmental entities, and plaintiffs appealed. The District Court of Appeal, 400 So.2d 799, reversed and remanded. Applications for review were granted. The Supreme Court, Overton, J., held that: (1) failure to install traffic control devices and failure to upgrade an existing road or intersection, as well as decision to build a road or roads with a particular alignment, are judgmental, planning-level functions and absolute immunity attaches; (2) failure to comply with statutory standards and criteria for design, construction and maintenance subjects governmental en-

ORIGINAL 83-6281

No. 83 -

Supreme Court, U.S.
FILED
FEB 13 1984
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

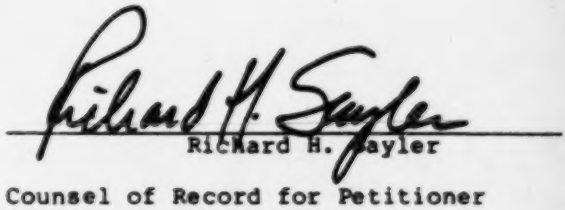
Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Pursuant to Rule 46 of the Supreme Court Rules, petitioner Jeffery Joseph Daugherty moves for leave to proceed in forma pauperis to petition for a writ of certiorari to review the judgment of the Florida Supreme Court summarily denying his petition for a writ of habeas corpus. Attached is an affidavit in the form prescribed by the Federal Rules of Appellate Procedure, Form 4, setting forth with particularity facts showing that petitioner comes within the statutory requirements. See 26 U.S.C. 1915. Petitioner was represented by appointed counsel in the trial court and on appeal to the Florida Supreme Court. Petitioner sought and was granted leave to proceed in forma pauperis in the habeas corpu proceedings in the Florida Supreme Court.

For the reasons stated and under the authorities cited above, petitioner prays that this Court grant the motion for leave to proceed in forma pauperis.

Dated: February 13, 1984



Richard H. Sayler

Counsel of Record for Petitioner
Jeffery Joseph Daugherty

30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Of Counsel:

Allan R. Freedman
Daniel J. Thomasch

DONOVAN LEISURE NEWTON & IRVINE

RECEIVED
FEB 15 1984
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SUPREME COURT, U.S.

No. 83

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

- x

JEFFERY JOSEPH DAUGHERTY :

Petitioner, :

-against- :

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, :

Respondent.

- x

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, JEFFERY JOSEPH DAUGHERTY being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ___ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1974 or 1975, about 500.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes ____ No X

   a. If the answer is yes, describe ech source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes ____ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

---

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Jeffery Joseph Daugherty
Jeffery Joseph Daugherty

STATE OF FLORIDA)
: ss:
COUNTY OF Bradford)

Subscribed and sworn to before me this the 19th day of January, 1984.

Bennie Hamrick
Notary Public

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 23, 1987

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 23, 1987